

NO. 83-753

Supreme Court, U.S.
FILED

NOV 22 1983

ALEXANDER L. STEVAS
CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1983

LUKE FONTANA,

PETITIONER

v.

MACK E. BARHAM, ET AL,

RESPONDENT.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

SUPPLEMENTAL APPENDIX

**JOHN P. MASSICOT
FRANK A. SILVESTRI
577 So. Carrollton
New Orleans, LA**

**FRANK SLOAN
121 Deckbar Avenue
Jefferson, LA**

Attorneys for Petitioner

share of the attorney's fees, resulting from his role in representing Mrs. Cheatam, in violation of Section 1983.

Defendants contend, relying on *Parratt v. Taylor*, __ U.S. __, 101 S.Ct. 1908 (1981), that this claim is not within the jurisdiction of this Court under Section 1983. Plaintiff urges that *Parratt* should be confined to negligent constitutional violations and that this alleged conspiracy is such an abuse of power as to require examination by an independent federal judiciary.

The Supreme Court in *Parratt* refused to allow a Section 1983 claim based on negligent deprivation of property by a state official. The Court determined that when there was no established policy resulting in a deprivation of constitutional right, and that state remedies were adequate, there was no unconstitutional deprivation of property or due process and, therefore, no basis for a Section 1983 claim. 101 S.Ct. at 1917.

In examining a Section 1983 claim, the Court determined that appropriate inquiry should focus on two elements;

- 1) whether the conduct complained of was committed by one acting under color of law; 2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

101 S.Ct. at 1913. As in *Parratt*, our inquiry is confined to the second question.

Fontana, like the plaintiff in *Parratt*, alleges a deprivation of his property and a denial of due process.

"Nothing in the [14th] amendment protects against all deprivations 'without due process of law.' " 101 S.Ct. at 1913. To determine if a plaintiff has been so deprived this Court must examine "whether the tort remedies which the [state] provides as a means of redress for property deprivations satisfies the requirements of procedural due process." 101 S.Ct. at 1914. In this case, the remedies provided by the state are sufficient and meet the procedural due process requirement.

The deprivation plaintiff complains of here, as in *Parratt*, "did not occur as a result of some established state procedure". 101 S.Ct. at 1917. The state in this case provides plaintiff with adequate remedies. These remedies "could have fully compensated the [plaintiff] for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process." 101 S.Ct. at 1917.

The concern of this Court is that the construction of Section 1983 urged by plaintiff would "almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under Section 1983." 101 S.Ct. at 1917. In keeping with the sentiments expressed by Mr. Justice Powell, concurring in the *Parratt* result, this ruling avoids "the prospect that the Due Process Clause, may become a vehicle for federal litigation of state torts." 101 S.Ct. at 1920, fn. 7.

In essence, this case is a dispute over attorney's fees. It is nothing more than a state court claim masquerading as a Section 1983 claim. The proper forum for plaintiff's claim, despite the Section 1983 trappings, is state court. There is no established state policy upon which defendant could have relied as depriving plaintiff of due process. The

right to receive his fair share of attorney's fees is one of a number of interests best protected by the state through its tort laws. Section 1983 was never intended to supplant state remedies. It was only intended to supplement those remedies. *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Section 1983 should not be employed as a means to disturb the balance between state and federal government where such an intrusion is clearly unwarranted.

As to the argument that *Parratt* should be confined to cases of negligent violation of constitutional rights, the Court's opinion is not so limited. Subsequent cases dealing with Section 1983 are in line with this view of *Parratt*. In *Sheppard v. Moore*, 514 F.Supp. 1372 (M.D.N.C. 1981), it was held that willful refusal to return property seized under color of state law as not a proper basis for a Section 1983 claim where the action was not the result of an established procedure "but rather the unpredictable, unauthorized and, if true, illegal acts of the individual defendants." 514 F.Supp. at 1376. The Court in *Sheppard* was of the opinion that the claim before it was a conversion, irrespective of the label attached to it by the plaintiff. 514 F.Supp. at 1376. Finding adequate state remedies existed and the lack of an established state policy, the District Court granted defendant's motion to dismiss. See also *Lewis v. County of Lehigh*, 516 F.Supp. 1369 (E.D.Pa. 1981).

Plaintiff's remedy in this case is to be found in state court. In light of the foregoing, the Court finds that the deprivation alleged is not such as to give this Court

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jurisdiction under Section 1983.

UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
January 6, 1982

APPENDIX "G"

DENIAL OF RECONSIDERATION

MINUTE ENTRY
ARCENEUX, J.
JANUARY 8, 1982

LUKE FONTANA

CIVIL ACTION

VERSUS

NO. 81-761

MACK E. BARHAM, ET AL.

SECTION "K"

This matter comes before the Court on plaintiff's motion for reconsideration of the Court's August 19, 1981 decision to grant the motions to reconsider the motions to dismiss of the defendant Mack E. Barham and the City of New Orleans, originally denied. The respective parties waived oral argument on the instant motion for reconsideration, and the Court took the matter under submission.

On January 7, 1982, the Court issued an opinion in support of its August 19, 1981 ruling. For the reasons expressed therein, IT IS HEREBY ORDERED that plaintiff's Motion for Reconsideration be DENIED.

Date of Entry Jan. 13, 1982

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OCTOBER TERM, 1983

NO. 83-753

LUKE FONTANA,

PETITIONER

v.

MACK E. BARHAM, ET AL,

RESPONDENT.

PROOF OF SERVICE

STATE OF LOUISIANA

ss.:

PARISH OF ORLEANS

FRANK SILVESTRI, after being duly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court he served the within SUPPLEMENTAL APPENDIX on counsel for Respondents by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

Mr. Galen Brown
Assistant City Attorney
City Hall
New Orleans, Louisiana 70112

**Mr. Phillip Whitman
Stone, Pigman, Walther Whitmann & Hutchinson
Suite 1000
Whitney Building
New Orleans, Louisiana 70130**

and depositing same in the United States mails at New Orleans, Louisiana on 21 November 1983.

FRANK A. SILVESTRI

**SUBSCRIBED AND SWORN TO
BEFORE ME THIS 21ST
DAY OF NOVEMBER, 1983.**

SEAL

**NOTARY PUBLIC IN AND FOR SAID
PARISH AND STATE WHO CERTIFIES
HE IS A MEMBER OF THE BAR OF THE
SUPREME COURT OF THE UNITED STATES**